RECENT CASES.

ATTORNEY & CLIENT—LIEN—PRIORITY—SET-OFF.—SMITH V. CAYUGA LAKE CEMENT CO., 95 N. Y. SUPP. 236.—*Held*, that where a judgment for plaintiff is wholly for disbursements incurred and services rendered by his attorney in correcting an erroneous decision, and plaintiff is a non-resident and insolvent, the attorney's lien for costs and compensation is superior to the defendant's claim for a set-off on a judgment in his favor rendered by another court in the same action.

The practice of courts, both in England and in this country, has differed widely in regard to this proposition. In England, the attorney's right to have his fees and disbursements paid out of the judgment obtained has long been recognized. *Marshall v. Meech*, 10 Am. Rep. 573. The courts of Common Pleas and Chancery held the lien subordinate to defendant's right of set-off. *Taylor v. Popham*, 15 Ves. 79. Later, these courts reversed their position and adopted the rule of the Court of King's Bench. *Simpson v. Lamb*, 49 Eng. L. & Eq. 59. The same rule was adopted by the Supreme Court of New York in the early case of *Devoy v. Boyer*, 3 Johns. 247. In the majority of states the attorney is deemed, to the amount of his lien, an equitable assignee of the judgment. *Marshall v. Meech*, 10 Am. Rep. 573. On the other hand, the courts of a few states hold the right of set-off is superior to the attorney's lien. *McDonald v. Smith*, 57 Ves. 502; *Mosely v. Norman*, 74 Ala. 422.

CONSTITUTIONAL LAW—FEDERAL COURTS—HABEAS CORPUS—CONCLUSIVENESS OF STATE DECISION.—BROWN V. URQUHART, 139 FED. 846.—*Held*, that the decision of the Supreme Court of a state that a state prisoner is not held in violation of rights under U. S. Constitution is not conclusive upon a federal court, which may, in its discretion, determine the question for itself on a writ of *habeas corpus*.

The decision of the highest court of a state should be obtained and carefully reviewed before a writ issue from a federal court. *People of N. Y. v. Eno*, 155 U. S. 89. And the petition must clearly show an irreconcilable antagonism between the federal and state law, otherwise the writ will not issue. *In re Hoover*, 30 Fed. 51. A claim under a provision in a state law would not justify a writ of *habeas corpus* by a federal court. *Gut v. Minnesota*, 76 U. S. 35; *In re Bresnahan*, 18 Fed. 62: In *ex parte Calvera*, 1 Wash. C. C., a foreign minister, illegally confined under a proper state warrant, was refused a writ. A noted case was *Whitten v. Tomlinson*, 160 U. S. 231, where, although an indictment lacked the words "a true bill," and was found by the grand jury by mistake and misconception, the federal courts refused to interpose.

CONTRACTS—PROMISE TO ANSWER FOR THE DEBT OF ANOTHER—STATUTE OF FRAUDS.—SMITH V. BURDETT, 95 N. Y. SUPP. 188.—*Held*, that an oral agreement by an owner to pay for the work and material furnished by a sub-contractor in the construction of a building, in case the principal contractor neglected to do so, is unenforceable because within the Statute of Frauds.

The interest which the promisor has in the performance of a contract by another, or the benefit which he may derive thereby, cannot determine his lia-

bility. That liability arises from the character of the promise, and the interest in the principal contract and the benefit to be derived from it becomes a matter of consideration only as they may serve to determine that character. *Clay v. Walton*, 9 Cal. 328. The vital point in cases of this class is: Was the contract original? *Payne v. Baldwin*, 14 Barbour 570. In order that the promise may be held to be within the statute it is essential that there be a binding and subsisting obligation or liability to the promisee to which the promise is collateral. 151 Ill. 175. The evidence required to change a contract relation between a plaintiff and a third party and to prove a promise to pay the debt of another as a new and original undertaking and not a contract of suretyship, must be clear and satisfactory; otherwise it will fall within the statute. *Haverly v. Mercer*, 78 Pa. 257. A case directly in point is *Diringer v. Moyniham*, 10 N. Y. Supp. 540, which held that a promise by defendant to see that workmen of sub-contractor were paid was a promise to pay debt of another, and, not being in writing, was unenforceable.

CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.—CRAUCH VS. BROOKLYN HEIGHTS Ry. Co., 129 N. Y. ST. REP. 169.—Plaintiff was injured at a grade crossing while proceeding to defendants' station—*Held*, that the fact that the plaintiff had seen a train approaching and had not waited to see if train would stop at the station, was not, under all circumstances, negligence in law.

It is established universally and beyond a doubt that negligence and contributory negligence are questions of fact for the jury, except in rare cases. *Burns v. Town of Elba*, 32 Wis. 605; *Balt. & Ohio R. R. Co. v. Shipley*, 31 Md. 370. That there are exceptional cases is unquestioned. *Tyson v. Tyson*, 37 Md. 567-581; *Balt. & Ohio R. R. Co. v. Fitzpatrick*, 35 Md. 32. But there is hopeless conflict on these cases. Compare the following: *Butler v. R. R. Co.*, 126 Pa. St. 160; *Lewis v. Balt. & Ohio R. R. Co.*, 38 Md. 588; *Brown v. Barnes*, 151 Pa. St. 562; *Moore v. Westervelt*, 21 N. Y. 103. In some states the question is controlled by the fact that the burden of showing ordinary care is put on the plaintiff. *Alger v. City of Lowell*, 3 Allen 402; *Cramer vs. City of Burlington*, 42 Iowa, 315. But see *Bradwell v. Pittsburg & West End Ry. Co.*, 139 Pa. St. 404; *Brown v. Traction Co.*, 14 Pa. Sup. Ct. 594. For a case where there is no room for doubt see *Balt. City Pass. Ry. Co. v. Wilkinson*, 30 Md. 224.

CORPORATIONS—EMINENT DOMAIN—LEGALITY OF CORPORATE EXISTENCE.—EDDLEMAN ET UX. V. UNION COUNTY TRACTION & POWER CO., 75 N. E. 510 (ILL.). *Held*, that the legality of the existence of a corporation cannot be attacked in condemnation proceedings instituted by it, but only in a direct proceeding by *quo warranto*.

The better rule seems to be as announced in the opinion above. *W. & P. R. Co. v. C. & C. R. & L. Co.*, 114 N. C. 690; *Morrison v. Forman*, 161 Ill. 247; *Niemeyer v. Little Rock Junction Ry.*, 43 Ark. 111. But some courts hold that a *de jure* corporate existence must be shown when it is sought to take property by eminent domain. *In re Brooklyn W. & N. Ry. Co.*, 72 N. Y. 245; *Powers v. H. & L. Ry. Co.*, 33 Oh. St., 429; *Orrich School Dist. v. Dorton*, 125 Mo. 439. *De jure* corporate existence must be set up in actions by a corporation to collect subscriptions made prior to incorporation. *Indiana F. & M. Co. v. Herkimer*, 46 Ind. 142; *Schloss v. Montgomery Trade Co.* 87 Ala. 414. The subscriber may be estopped to attack the corporate existence if he participated in the formation of the corporation. *Bell's Appeal*,